IN THE HIGH COURT OF JUDICATURE, ANDHRA PRADESH
AT HYDERABAD

(Special Original Jurisdiction)

WEDNESDAY, THE TWENTY EIGHTH DAY OF JANUARY
TWO THOUSAND AND FOUR

PRESENT

THE HON'BLE MR JUSTICE B. SUDERSHAN REDDY

and
THE HON'BLE MR JUSTICE M.NARAYANA REDDY

WRIT PETITION NO : 8082 of 2004

Between:

M/s. Sun Techno Constructions (P) Ltd., (Formerly Techno Constructions) Engineers & Railway Contractors, 402, Santhoshi Apartments, Jyothi Colony, AOC Main Gate, Secunderabad - 15. Rep. by its Managing Director, M. Mukund Reddy

..... PETITIONER

AND

1 Union of India, Rep. by its General Manager, South Central Railway, III Floor,Rail Nilayam, Secunderabad.
2 Chief Administrative Officer, Construction, S.C. Railway, Secunderabad.
3 Chief Engineer(I), Construction, South Central Railway, Secunderabad.

.....RESPONDENT(S)

Petition under Article 226 of the Constitution of India praying that in the circumstances stated in the Affidavit filed herein the High Court will be pleased to issue any appropriate Writ, Order or Direction more particularly one in the nature of a Writ of Mandamus declaring the order in A.A.No.1 of 2004 dated 2-4-2004 passed by the Learned Chief Justice as illegal and void and consequently appoint a Sole Arbitrator for deciding the disputes and differences arising out of the work " Conversion of Mudked - Secunderabad section from MG to BG Br.No.433 Exg. (1X12.20 M Steel Girder) at Km. 432/2-3 and Br. No.434 Exg. (21 x 18.3 m Steel girder) at Km. 432/11-433/2 between Basar - Fakhrabad stations- Proposed strengthening of exg. foundations and substructure and casting and launching of PSC girders in superstructure for MBG loading standards duly removing the existing

MG Steel girders including providing one additional span of (1x 18.30 m PSC) for Br.No.434" under agreement No. 45/CAO/C/SC/99 dated 6-9-1999

Counsel for the Petitioner:MR.A.RAMALINGESWAR RAO

Counsel for the Respondent No.: MR.S.R.ASHOK for Mrs.C.V.VINITHA REDDY

The Court made the following :

ORDERS : (Per MNR,J)

These Orders, according to Law, arise out of a Writ Petition, filed by the sole Writ Petitioner, against R.1 to R.3, under Article 226 of the Constitution of India, 1950, questioning the, validity and legality, of the adjudications made by, and set forth in para 2, infra.

2. Orders, dated 2-4-2004, of the learned Chief Justice, High Court of Andhra Pradesh, Hyderabad, made in Arbitration Application No.1/2004.

3. Perused the material papers of the Record.

4. Arguments were heard of the learned Counsel for both the parties.

5. The sole petitioner in this Writ Petition corresponds to the sole petitioner in the said Arbitration Application No.1/2004, of the file of the High Court. R.1 to R.3 herein correspond, respectively, to R.1 to R.3, therein.

6. The parties are, henceforth, referred to, as such, as in the Writ Petition, lest, so specified.

7. The petitioner is M/s. Sun Techno Constructions (P) Ltd (Formerly Techno Constructions) Engineers & Railway Contractors. R.1 is Union of India, represented by the General Manager, South Central Railway. R.2 is the Chief Administrative Officer, and R.3 is the Chief Engineer (I), both, of Construction, South Central Railway, Secunderabad.

8. The sole Writ Petitioner filed the said Arbitration Application, against R.1 to R.3, under sub-Section (6) of Section 11 of the Arbitration and Conciliation Act, 1996 (here-in-after referred to as, “the said Act”), read with the Scheme for appointment of Arbitrator, 2000, for the main reliefs, set forth, hereunder:-

“to appoint Arbitrator, for passing an Award, in respect of the disputes

and differences between the parties, arising out of the work referred to and set forth in sub-para (a) of para 12, infra."

9. R.1 to R.3 opposed the foregoing reliefs, and, hence, urged for dismissal of the said Arbitration Application.

10. Subsequently, after due enquiry there-into, the learned Chief Justice, by the now impugned Orders, dated 2-4-2004, set forth in para 2, supra, adjudicated thereupon, as under:-

a. Refused to appoint an Arbitrator, as claimed; and

b. Consequently, dismissed the Arbitration Application, observing, that, it is open for the parties to proceed to act in accordance with the procedure laid down in Clause 64 (3)(a)(ii) of GCC for appointment of arbitrators.

11. The brief, material, required, facts and circumstances of the case, are, all, set forth in the foregoing paragraphs.

12. The material part of the case of the sole Writ petitioner, as set forth in the affidavit filed in support thereof, by its Managing Director, is set forth, in brief, as under:-

a. The petitioner entered into an agreement with R.3, on 6-9-1999, that, the work of "Conversion of Mudkhed –Secunderabad Section from MG to BG Br.No.433 Exg. (1 x 12.20 M Steel Girder) at Km.432/2-3 and Br.No.434 Exg. (21 x 18.3m Steel Girder) at Km.432/11-433/2 between Basar – Fakhrabad Stations – Proposed strengthening of exg. Foundations and substructure and casting and launching of PSC girders in superstructure for MBG loading standards duly removing the existing MG steel girders including providing one additional span of (1 x 18.30 m PSC) for

Br.No.434", which was exhibited by R.3, on 24-5-1999, for total value of Rs.4,72,55,037-74 ps., where under, the work has to be completed within 12 months from that date of acceptance;

b. That Agreement is subject to the General Conditions of Contract, 1998 (henceforth, referred to as, the said Conditions);

c. Subsequently, the said work was extended, from time to time, up to 30-9-2003;

d. In respect of the works covered thereby, several disputes arose between the parties, among other aspects, *inter alia,* as to the claims made by the petitioner, etc. The letter, dated 25-6-2003, addressed by the petitioner, to R.3, in respect thereof, was replied by R.3, by a letter, dated 9-9-2003, rejecting the claims made therein, by the petitioner; and

e. Because, no Arbitrator was appointed even after two months, the petitioner was constrained to file the said Arbitration Application No.1/2004, in the High Court, on 29-12-2003, for the reliefs set forth in para 8, supra.

13. The material part of the case of R.1 to R.3, as set forth in the counter-affidavit thereto, filed by R.3, in that Arbitration Application, as set forth, in brief, as under:-

"Under Clauses 63 of the said Conditions, as well as 64 (1) (i) thereof, the present Arbitration Application is pre-mature, and, hence, is not maintainable at Law, and, hence, is liable to be dismissed, as such, and that, even otherwise, the appointment of Arbitrator is in process, etc."

14. Subsequently, the learned Chief Justice enquired into the said Arbitration Application, and, later, adjudicated thereupon, by Orders, dated 2-4-2004, set forth, in detail, in para 10, supra, refusing to appoint an Arbitrator, as claimed, etc.

15. The learned Chief Justice dismissed the said Arbitration Application, on the main, and, so to say, on the sole ground of that Application of being pre-mature, as can directly be seen from those Orders.

16. The Agreement, dated 6-9-1999, entered into between the petitioner and R.3, as well as, the said General Conditions of Contract, that govern the same, and contained at page Nos.65 to 73, of the Paper Book filed by the petitioner, are admitted.

17. The learned Chief Justice relied upon Condition Nos.63 and 64 of the said Conditions, and, on their basis, found, that, the Arbitration Application is premature, and, hence, dismissed the same, as such.

18. We are of the opinion, that, those two Conditions are material for considering and appreciation of the merits, or, demerits, of the now impugned Orders, as also, the maintainability thereof, at fact and Law, or, otherwise. Hence, for better consideration, interpretation, and, appreciation thereof, the relevant portions of both those two Conditions are re-produced, verbatim, hereunder:-

> **63. Matters finally determined by the Railway:-** All disputes and differences of any kind what-so-ever arising out of or in connection with the contract, whether during the progress of the work or after its completion and whether before or after the determination of the contract shall be referred by the contractor to the Railway and the Railway shall within 120 days after receipt of contractor's representation make and notify decisions on all matters referred to by the contractor in writing provided that matters for which provisions has been made in clauses 8(a), 18, 22 (5), 39, 43(2), 55, 45 (A), 55-A (3), 57, 57-A, 61 (1), 61 (2) and 62 (1) (b) of General Conditions of Contract or in clause of the special conditions of the contract shall be deemed as 'expected matters' and decision of the Railway authority, thereon, shall be final and binding on the contractor provided further that 'expected matters' shall stand specifically excluded from the purview of the Arbitration clause and not be referred to arbitration.

64(1)(i) Demand for Arbitration.

> In the event of any dispute or difference between the parties hereto as to the construction or operation of this contract, or, the respective rights and liabilities of the parties on any matter in question, dispute or difference on any account or as to the withholding by the Railway of any certificate to which the contractor may claim to be entitled to, or if the Railway fails to make a decision within 120 days, then and in any such case, but except in any of the 'expected matters' referred to in clause 63 of these conditions, the contractor, after 120 days but within 180 days of his presenting his final claim on disputed matters, shall demand in writing that the dispute or difference be referred to Arbitration.

19. It is admitted, as also, the said clause 64 (1) (i) makes it manifest, that, there is an Agreement between the parties, for appointment of an Arbitrator, in respect of the disputes between the parties, referred to, therein.

20. Hence, undoubtedly, under clause (a) of sub-Section (6) of Section 11 of the said Act, the petitioner is entitled for appointment of an Arbitrator, as stipulated, or, agreed upon, between the parties.

21. However, where there is stipulation, or, agreement, or, condition, in between the parties, as to the time, within which the Arbitrator/s has/have to be appointed by the Appointing Authority, then, no Arbitrator/s can be appointed, or, expected to be appointed, earlier than prescribed time agreed upon between the parties.

22. When there is no stipulation, or, prescription, of time, between the parties, then, undoubtedly, on the basis of the Agreement between the parties, as to appointment of an Arbitrator, an Arbitrator could, or, should, have been appointed under the said clause (a) of sub-Section (6) of Section 11 of the said Act, immediately.

23. However, because, there is time prescribed, or, stipulated, between the parties, for such appointment, no Arbitrator can be appointed earlier than the agreed period, and, hence, any Arbitration Application, filed before expiry of such period agreed upon, will be not maintainable, and be liable to be dismissed, as such, as pre-mature.

24. Had there been no such agreement, or, stipulation, or, prescription, as to time, between the parties, for appointment of an Arbitrator, then, things will be otherwise. Lest, not. Here, things are otherwise, as aforesaid.

25. So, therefore, sub-Section (6) of Section 11 of the said Act is subject to the specific stipulations, or, prescriptions, or, conditions, agreed upon between the parties, *inter alia,* as to time.

26. When so, as can directly be seen from the Condition No.64(1)(i), as set forth in para 18, supra, the parties agreed upon, that, in case, the Railways fail to make a decision within 120 days, after demand, in respect of the disputes, or, claims made by the application i.e., subsequent to the said 120 days, but, within 180 days, of presenting the final claim, on disputed matters, then only, the petitioner shall demand, in writing, for reference of the disputes, or, differences, for arbitration. That Clause 64 (1)(i) is clear and in unequivocal terms in respects thereof, and, it is self-speaking, without any ambiguity in that regard.

27. So, therefore, under the said Section 11(6)(a), an Arbitrator cannot, straight away, be appointed, in the case, on hand, where, such a claim, or, demand, for arbitration was made by the petitioner, before expiry of the said agreed periods of 120 days.

28. Now, it has to be examined, as under, as to whether, the petitioner made such demand, either, before expiry of the said 120 days, contemplated by the said condition 64 (1) (i), or, thereafter, but, before the expiry of 180 days, again, as contemplated thereby.

29. As could be seen from the material papers, on 25-6-2003, the petitioner, *inter alia,* made 15 disputed claims. As can directly be seen there from, there is no reference, or, request, much less, demand, what-so-ever, made therein, asking R.3, to appoint Arbitrator, at all.

30. To that, R.3 sent a reply, dated 9-9-2003, contained at page Nos.49 to 53 of the material papers, whereby, *inter alia,* at the end thereof, R.3 had rejected all the claims, made by the petitioners, as not justified and not acceptable.

31. Thereupon, subsequently, on 22-10-2003, referring to that reply, dated 9-9-

2003, of R.3, the petitioner, *inter alia,* addressed a letter to R.3. At the end thereof, the petitioner demanded R.3, to refer the disputes, for arbitration, in terms of the aforesaid condition No.64, set forth in para 18, supra. This letter, dated 22-10-2003, is contained at page Nos.42 to 48 of the material papers.

32. Now, it has to be examined, as to, whether, this demand for reference to arbitration made by the petitioner, by its letter, dated 22-10-2003, referred to in the immediately preceding paragraph, was made before the expiry of 120 days, and also, before expiry of 180 days, contemplated by the said condition No.64, after the date of letter, dated 9-9-2003, of R.3, rejecting the claims of the petitioner.

33. The said letter of R.3, referred to in para 30, supra, rejecting the claims of the petitioner is dated 9-9-2003. The letter, referred to in para 31, supra, of the petitioner, addressed to R.3, demanding reference to arbitration, is dated 22-10-2003. The period intervening the 2 letters is only 40 days, approximately. Hence, the demand for arbitration is very, very, much, premature, because, by then, the said 120 days have had not yet expired, even though, it is very much well within 180 days.

34. Again, the said Arbitration Application was filed before the learned Chief Justice, for the first time, on 29-12-2003.

35. Again, when this date is examined, *vis-à-vis,* any of the dates, being, 22-10-2003, of the petitioner, demanding for arbitration, or, 9-9-2003, when R.3 rejected the claims of the petitioner, in either case, the intervening period is far less than 120 days, stipulated by the said condition No.64 (1)(i), even if, the same is within 180 days.

36. Hence, the said Arbitration Application No.1/2004, is premature, and, hence, was rightly dismissed by the impugned Orders.

37. The learned Counsel for the Writ Petitioner relied upon 4 Rulings, set forth, hereunder:-

1. ***2003 (3) ALT, 16 (SC) (MICHAL GILL v. M.P.S.R.T.C.).***
   This Ruling is not one, delivered, *inter alia,* interpreting the provisions of the Arbitration Act, either of 1943, or, of 1996. It pertains to a dispute

between the parties, *inter alia,* under the Industrial Disputes Act, 1947, wherein, in that Appeal before it, the Supreme Court refused permission, to the appellant therein, to raise and produce, for the first time, that, the appellant is a driver, and, to produce the appointment letter, etc.

2. ***(2000) 8 S.C.C., 151 (DATAR SWITCHGEARS LTD., v. TATA FINANCE LTD., AND ANOTHER),*** delivered, *inter alia,* interpreting sub-Section (6) of Section 11 of the Arbitration and Conciliation Act, 1996, *inter alia,* postulating, that, even if, the party having responsibility, to appoint an Arbitrator, doesn't do so within 30 days of demand, being made by the other party, due to that fact itself, the right to make such an appointment by such party will not, automatically, be forfeited, and, that, notwithstanding, even in such a case, such appointment can be made, but, at the same time, and, in no case, before the other party moves the concerned Court, under Section 11 of that Act.

3. ***2003 (1) ALT, 321 (M/s.MADHAVA HYTECH ENGINEERGS PVT. LIMITED, SECUNDERABAD v . UNION OF INDIA, SOUTH CENTRAL RAILWAY, SECUNDERABAD AND ANOTHER),*** *inter alia,* interpreting Section 11 (6) of the said Arbitration Act, 1996, *vis-à-vis, Section 5 and Article 137, both, of the Limitation Act, 1963, inter alia,* postulating, that, the Court can condone the delay, by extending benefits of the said Section 5, even in case application for arbitration was filed beyond the period of 3 years, from the date of the cause of action that arose for filing of the same.

4. ***2003 (6) ALT, 641 (DB), (UNION OF INDIA, SOUTH***

CENTRAL RAILWAY, SECUNDERABAD AND OTHERS v. B. JANARDHANA REDDY AND ANOTHER), delivered, *inter alia,* interpreting sub-Section (6) of Section 11 of the said Arbitration Act, 1996. The placitum thereof is re-produced, verbatim, hereunder, for better appreciation.

38. The respondents, as also, in the impugned Orders, ***2003 (8) Supreme, 564 (Union of India & Anr. V. M/s. Sohan Lal Puglia),*** relied upon, *inter alia,* interpreting sub-Section (4) of Section 20 of the repealed Arbitration Act, 1940. In this Ruling, the Supreme Court, set aside the Orders of the District Judge, as confirmed by the High Court, appointing, 2 retired District Judges, as Arbitrators, observing, that, the District Judge, instead of appointing by himself, the said 2 Arbitrators, ought to have directed the parties to the *lis* themselves, to appoint Arbitrators in terms of the Arbitration Agreement. As can be seen from the facts and circumstances, covered by this Ruling, the appellant therein, did not refuse to appoint an Arbitrator, as per the terms of the said Arbitration Agreement, but, notwithstanding, the District Judge appointed the said 2 Arbitrators, which was found by the Supreme Court, as unsustainable, and, hence, set aside the same, etc.

39. An examination of the full texts of the foregoing Rulings, referred to in paras 37 and 38, supra, and the facts, the circumstances, and the context, in which each of those Rulings were delivered, on the one hand, and the same, prevailing, in the case, on hand, and, set forth in paras 8 to 38, supra, are distinct and dis-similar, and, hence, those Rulings do not apply to the case, on hand. Even if, the distinctions appear to be subtle, at the same time, the same are of vast significance, and consequence, and, hence, rendering the same inapplicable to the facts, and, circumstances of the case, and, the context, covered by the specific case, on hand.

40. When once it is found, that, that the Arbitration Application is filed premature, and, hence, is not maintainable, and, hence, is liable to be dismissed, then, in such a case, there will be no question of probing into the other aspects, or, grounds, urged for the Writ Petitioner, either, in the Grounds of Appeal, or, at the time of arguments. Because, the filing of the Arbitration

Application, within the time frame, fixed by the parties, is decisive, and is a condition precedent. When that is not there, then, the other aspects will not arise for consideration, much less, adjudication thereupon. Hence, they do not require to be probed into, and decided, herein.

41. Hence, examined from any point of view, the impugned Orders, set forth in para 2, supra, are sustainable, at fact and Law, in toto, as the same stand, as such.

42. Hence, the Writ Petition is devoid of factual and legal, merits, and, hence, is liable to be dismissed, in toto, as such, as is being done, hereunder.

43. Hence, the Division Bench of the High Court doth hereby adjudicate upon the Writ Petition, dismissing the same, in toto, but, without costs to any of the parties thereto.

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(B.SUDERSHAN REDDY,J)

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(M. NARAYANA REDDY, J)

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To

1 Union of India, Rep. by its General Manager, South Central Railway, III Floor,Rail Nilayam, Secunderabad.
2 Chief Administrative Officer, Construction, S.C. Railway, Secunderabad.
3 Chief Engineer(I), Construction, South Central Railway, Secunderabad.